Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

JOHN LONBERG,

*Petitioner,*

v.

CITY OF RIVERSIDE,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Americans with Disabilities Act's transition-plan regulations, 28 C.F.R. § 35.150(d), are enforceable by private right of action.

## PARTIES TO THE PROCEEDING

The caption to the case contains the names of all of the parties to the proceedings.

## TABLE OF CONTENTS

Page

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTORY PROVISIONS INVOLVED ..... 2

INTRODUCTION ..... 4

STATEMENT ..... 6

A. The ADA's statutory and regulatory scheme ..... 6

B. John Lonberg is being denied access to streets and sidewalks ..... 8

C. Petitioner's suit and the District Court's grant of an injunction against the City ..... 9

D. The Ninth Circuit's decision ..... 10

REASONS FOR GRANTING THE PETITION ..... 11

I. The Ninth Circuit's decision furthers a split among the federal circuits on an issue of recurring and substantial importance ..... 12

II. The Ninth Circuit's decision contravenes the text of the Americans with Disabilities Act and this Court's decision in *Sandoval* ..... 13

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

Page(s)

### Federal Cases

*Ability Ctr. of Greater Toledo* v. *City of Sandusky*,
385 F.3d 901 (6th Cir. 2004) ..... 4, 10, 12

*Alexander* v. *Sandoval*,
532 U.S. 275 (2001) ..... passim

*Barnes* v. *Gorman*,
536 U.S. 181 (2002) ..... 6

*Chaffin* v. *Kan. State Fair Bd.*,
348 F.3d 850 (10th Cir. 2003) ..... 4, 10, 12, 18

*Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*,
467 U.S. 837 (1984) ..... 15

*Iverson* v. *City of Boston*,
452 F.3d 94 (1st Cir. 2006) ..... 4, 10, 12

*Lonberg* v. *City of Riverside*,
571 F.3d 846 (2009) ..... 1

*Matthews* v. *Jefferson*,
29 F. Supp. 2d 525 (W.D. Ark. 1998) ..... 9

*McCready* v. *Michigan State Bar*,
881 F. Supp. 300 (W.D. Mich. 1995) ..... 9

*Schonfeld* v. *City of Carlsbad*,
978 F. Supp. 1329 (S.D. Cal. 1997) ..... 9

*Tennessee* v. *Lane*,
541 U.S. 509 (2004) ..... 5

## TABLE OF AUTHORITIES—Continued

Page(s)

### Federal Statutes

28 U.S.C. § 1254(1) ..... 1
28 U.S.C. § 1291 ..... 1
28 U.S.C. § 1292(a) ..... 1
28 U.S.C. § 1331 ..... 1
28 U.S.C. § 1343 ..... 1
28 U.S.C. § 1367 ..... 1
29 U.S.C. § 794a ..... 2, 3, 14
42 U.S.C. § 12101(a) ..... 6
42 U.S.C. § 12132 ..... passim
42 U.S.C. § 12133 ..... passim
42 U.S.C. § 12134 ..... passim

### Federal Regulations

28 C.F.R. § 31.150 ..... 11
28 C.F.R. § 35.101 ..... 12, 14, 15, 17
28 C.F.R. § 35.101 to § 35.189 ..... 14
28 C.F.R. § 35.150 ..... passim
28 C.F.R. § 39.101 ..... 6
28 C.F.R. § 39.150 ..... passim
28 C.F.R. Part 35 ..... 14
28 C.F.R. part 39 ..... 3, 15, 19

TABLE OF AUTHORITIES—Continued

Page(s)

**Other Authorities**

HR Rep No. 101-485(II), 101st Cong., 2d Sess. 95-96 (1990), reprinted in 1990 USCCAN 378 .....6

## PETITION FOR A WRIT OF CERTIORARI

Petitioner John Lonberg respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The court of appeals' opinion is reported at 571 F.3d 846. App. 1a. The order denying the petition for rehearing en banc is unreported. *Id.* 59a. The orders of the United States District Court for the Central District of California are also unreported. *Id.* 15a; *id.* 17a; *id.* 33a.

## JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and § 1343 over petitioner's federal civil-rights claims, and the district court exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over petitioner's state law claims. The court of appeals had jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment, and under 28 U.S.C. § 1292(a) to review its entry of a permanent injunction. The court of appeals filed its opinion on June 26, 2009, and it denied, on January 15, 2010, petitioner's timely filed petition for rehearing en banc. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves Section 202 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (hereinafter "§ 12132"), which prohibits public entities from discriminating against qualified individuals with a disability in the administration of services and programs. In its entirety, § 12132 states:

> § 12132. Discrimination. Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

This case also involves Section 203 of the ADA, 42 U.S.C. § 12133 (hereinafter "§ 12133"), which created a private cause of action to enforce the ADA by incorporating the remedies, procedures, and rights of 29 U.S.C. § 794a. In its entirety, § 12133 states:

> § 12133. Enforcement. The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Finally, this case involves Section 204 of the ADA, 42 U.S.C. § 12134 (hereinafter "§ 12134"), which directed the Attorney General to promulgate regulations consistent with the transition plan regulations for the Rehabilitation Act, 28 C.F.R. § 39.150(d). In pertinent part, § 12134 states:

§ 12134. Regulations. (a) In general. Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. . . . (b) Relation to other regulations. . . . With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

## INTRODUCTION

This case involves a recognized and mature circuit split over an issue of substantial and recurring importance—whether the ADA's transition-plan regulation, 28 C.F.R. § 35.150(d), is enforceable by private cause of action. The Ninth Circuit panel below agreed with the First and Sixth Circuits that § 35.150(d) is not privately enforceable. App. 6a (citing *Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004), and *Iverson* v. *City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006)). In so holding, the panel reversed the district-court decision, which had followed the Tenth Circuit in concluding that § 35.150(d) is privately enforceable. App. 6a (citing *Chaffin* v. *Kan. State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003)). The importance of the question presented to advancing the goals of the ADA, and the uncertainty in the law that the split of authority creates, counsel strongly in favor of granting the petition.

When Congress creates a private right of action to enforce a statute, it necessarily intends to create a private right of action to enforce regulations implementing that statute. *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Here, it is undisputed that Congress created a private right of action to enforce the ADA. 42 U.S.C. § 12133. So the only question is whether § 35.150(d)'s transition-plan requirements implement the ADA. They plainly do. In enacting the ADA, Congress expressly required the Attorney General to adopt transition-plan requirements similar to those already in place for the Rehabilitation Act. 42 U.S.C. § 12134. And that is precisely what § 35.150(d) accomplishes. Moreover, as explained further below, the transition-plan requirements are critical to implementing the ADA. Without compre-

hensive transition plans that identify barriers to access, public entities cannot proactively resolve accessibility issues. The natural result is that millions of people with disabilities will be unable to participate in public services, programs, and activities unless they file suit, the very scenario that Congress sought to prevent when it enacted §§ 12132, 12133, and 12134. Accordingly, this Court should adopt the Tenth Circuit's holding that § 35.150(d) is privately enforceable and should reject the contrary holdings of the First, Sixth, and Ninth Circuits.

The circuit split over the issue of § 35.150(d)'s private enforceability engenders uncertainty for public entities and results in differing treatment of claimants depending on the circuit where they live. In addition, the issue presented is one of immense practical importance. As this Court noted in *Tennessee* v. *Lane*, 541 U.S. 509, 511 (2004), the sheer volume of passive discrimination against persons with disabilities "was an appropriate subject for prophylactic legislation." And, as catalogued in the *amici curiae* briefing below, there are numerous lawsuits currently pending against public entities just on the narrow issue of sidewalk accessibility, lawsuits that would be wholly unnecessary if cities created and implemented transition plans as the law requires. The Ninth Circuit's decision adversely affects the rights and lives of many and is directly contradicted by the plain language of the ADA. This Court should grant the petition and reverse.

## STATEMENT

### A. The ADA's statutory and regulatory scheme

Congress enacted the ADA in 1990 to address the "serious and pervasive" isolation of and discrimination against millions of Americans with a physical or mental disability. 42 U.S.C. § 12101(a). Congress specifically tailored Title II of the ADA to address "passive" or "exclusionary" discrimination by local and state governments, particularly those governments' failure to modify structural barriers to disability inclusion. See HR Rep No. 101-485(II), 101st Cong., 2d Sess. 95-96 (1990), reprinted in 1990 USCCAN 378.

Section 12132 prohibits public entities from discriminating against qualified individuals with a disability in the administration of services and programs. 42 U.S.C. § 12132. As the Ninth Circuit recognized below, the prohibition "is universally understood as a requirement to provide 'meaningful access.'" App. 10a.

Due to the passive discrimination that Title II is designed to remedy, § 12133 expressly authorizes a private right of action to "[a]ny person alleging discrimination on the basis of disability in violation of section 12132. . . ." Important for purposes of Mr. Lonberg's suit here, available remedies include injunctive relief. *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002).

Transition-plan requirements have their genesis in § 12134, which required the Attorney General to "promulgate regulations" by July 26, 1991, that were consistent with the Rehabilitation Act regulations already in effect for federally conducted activities. 42 U.S.C. § 12134(a), (b) (citing 28 C.F.R. § 39.101 *et*

*seq.*). Among the regulations Congress specifically directed the Attorney General to implement was a regulation that requires public entities to develop transition plans that identify physical obstacles limiting access to the entities' programs and activities, and that explain how and when those obstacles will be removed. See 28 C.F.R. § 39.150(d). Accordingly, the regulations the Attorney General promulgated require certain public entities (i.e., those entities that would need to make "structural changes to facilities" to meet ADA standards) to "develop . . . a transition plan setting forth the steps necessary to complete such changes." 28 C.F.R. § 35.150(d). At a minimum, such a plan must identify physical obstacles that limit accessibility; describe the methods that will be used to make facilities accessible; create an implementation schedule; and indicate the government official responsible for plan implementation. 28 C.F.R. § 35.150(d)(3).

The Disability Rights Section of the U.S. Department of Justice's Civil Rights Division has identified failure to develop transition plans as one of the ADA's most "common problems." The ADA and City Governments: Common Problems (Oct. 9, 2008), available at http://www.ada.gov/comprob.htm [hereinafter "Common Problems"]. As the Department of Justice observes, when transition plans are not developed, "city governments are ill-equipped to implement accessibility changes required by the ADA," and the city "can only react to problems rather than anticipate and correct them in advance." *Id.* The necessary result is that "people with disabilities cannot participate in or benefit from the city's services, programs, and activities." *Id.* This is the exact harm that Congress sought to prevent when it enacted § 12132 and made it privately enforceable.

### B. John Lonberg is being denied access to streets and sidewalks.

Petitioner John Lonberg is a resident of the City of Riverside, California. He is a man with paraplegia who uses a wheelchair for mobility. Mr. Lonberg uses the City's public streets and sidewalks on a regular and ongoing basis to, among other things, take his grandchildren to sporting events, patrol the streets as a Handicap Parking Patrol Officer, attend church, accompany his grandchildren to school, and go to Kaiser Hospital.

The City of Riverside is a municipal corporation and charter city of the State of California that is subject to the ADA. By federal mandate, the City was supposed to have a transition plan in place by July 26, 1992, 28 C.F.R. § 35.150(d)(1), and was required to bring its facilities into ADA compliance no later than January 26, 1995, 28 C.F.R. § 35.150(c). Yet, more than 15 years later, the City acknowledges that there are still "thousands" of unlawful barriers to Mr. Lonberg's mobility throughout the City. After examining the evidence, the district court concluded that the City "has engaged in *a pervasive pattern of violating Title II* of the ADA and the regulations related thereto." App. 30a (emphasis added).

The physical obstacles that Mr. Lonberg encounters within the City prevent him from using certain City streets and sidewalks, or require him to risk his health and safety by going around or through obstacles. The district court concluded that the challenges Mr. Lonberg faces due to these obstacles "cause him irreparable harm." App. 20a.

### C. Petitioner's suit and the District Court's grant of an injunction against the City

Mr. Lonberg initiated his lawsuit in 1997. The district court divided the litigation into three phases. At issue in this appeal is phase one, concerning Mr. Lonberg's claim that the City lacked an adequate transition plan as 28 C.F.R. § 35.150(d) requires.

On June 12, 2000, the district court first concluded, as a matter of law, that the City lacked an adequate transition plan addressing the thousands of barriers to accessibility within the City. The City amended its plans in November 2000 and again in July 2001, but the district court held that these plans likewise failed to meet the requirements of ADA Title II and its accompanying regulations. In so ruling, the district court noted that the City had not raised the issue whether § 35.150(d) is enforceable by a private citizen by means of a federal lawsuit. But the court noted that several district courts had held that such a private right of action exists, at least where the plaintiff seeks injunctive relief. App. 43a (citing *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 539 (W.D. Ark. 1998); *Schonfeld* v. *City of Carlsbad*, 978 F. Supp. 1329 (S.D. Cal. 1997); *McCready* v. *Michigan State Bar*, 881 F. Supp. 300 (W.D. Mich. 1995)).

On March 21, 2006, the district court entered a permanent injunction against the City, requiring it to prepare a transition plan that complies with the ADA and 28 C.F.R. § 35.150. App. 15a. The City then moved for a new trial, arguing for the very first time—after a decade of litigation--that Mr. Lonberg did not have a right to privately enforce § 35.150(d). The district court denied the City's motion on the merits, reaching the same conclusion as the Tenth

Circuit's decision in *Chaffin* v. *Kansas State Fair Board*, 348 F.3d 850, 858 (10th Cir. 2002), that § 35.150(d) is privately enforceable.

### D. The Ninth Circuit's decision

The City appealed, and a divided panel of the Ninth Circuit reversed, holding that § 35.150(d) does not create a private right of action. (The dissenting judge would have affirmed based on waiver. App. 13a.) The panel majority, acknowledging that other "circuits have split" on the issue, App. 6a, declined to follow the Tenth Circuit's lead in *Chaffin*, choosing instead to follow the Sixth and First Circuit decisions in *Ability Center of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004), and *Iverson* v. *City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006). In so ruling, the majority failed entirely to analyze either the ADA provision directing the Attorney General to promulgate a transition-plan regulation, 42 U.S.C. § 12134, or the provision creating a private cause of action to enforce the ADA, 42 U.S.C. § 12133.

Mr. Lonberg petitioned for rehearing en banc, and on July 17, 2009, the panel unanimously ordered the City to file a response. App. 58a. On January 15, 2010, the panel majority voted to deny the petition, with one judge recommending that the petition be granted. App. 59a. The petition for rehearing en banc also received a split vote but failed to garner the support of a majority of the nonrecused, active judges of the Ninth Circuit. *Id.*

## REASONS FOR GRANTING THE PETITION

This Court should review the Ninth Circuit's decision because the circuits are split over the recurring and important issue whether a person with a disability has a private right of action to enforce the ADA's transition plan regulation, 28 C.F.R. § 31.150. As a result of the panel majority's ruling below, millions of individuals with a disability who live in or visit the Ninth Circuit (or the Sixth and First Circuits that the panel majority followed), will inevitably be barred from participating in or benefiting from city services, programs, and activities, the very type of passive discrimination that Congress sought to remedy in enacting the ADA.

The Ninth Circuit's decision is also inconsistent with the plain text of §§ 12133 and 12134. Even though Congress identified a specific transition-plan regulation as necessary to implement the ADA (§ 12134), and expressly created a private right to enforce the ADA (§ 12133), the panel majority failed to address either of these sections in concluding that the regulation could not be enforced by private action. That conclusion was error.

Finally, the Ninth Circuit's decision conflicts with this Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, this Court stated that "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute [i.e., the regulation] to be enforced as well." *Id.* Here, Congress specifically created a right that implements § 12132 by directing the Attorney General to promulgate regulations requiring a transition plan, thereby demonstrating that Congress intended both to create the right to a transition plan, see 42 U.S.C. § 12134,

*and* a private right of action to enforce the transition plan, see *id.* § 12133. And the authoritative regulations do just that by "effectuat[ing]" the prohibition against "discrimination on the basis of disability by public entities" by requiring public entities to "develop a transition plan." See 28 C.F.R. §§ 35.101 & 35.150(d). Because Congress intended to provide a private right of action to enforce the ADA transition-plan regulation, such regulation is privately enforceable under *Sandoval*.

## I. The Ninth Circuit's decision furthers a split among the federal circuits on an issue of recurring and substantial importance.

The Ninth Circuit recognized its decision furthered a clear circuit split as to whether § 35.150(d) creates a private right of action. App. 6a. The Ninth Circuit aligned itself with the Sixth Circuit in *Ability Center*, and the First Circuit in *Iverson*. In so ruling, the Ninth Circuit reversed the district court, which had reached the same conclusion as the Tenth Circuit in *Chaffin*.

The Tenth Circuit's opinion in *Chaffin* correctly rejects the panel majority's conclusion here that § 35.150(d) somehow creates a new right that cannot be found in Title II. In the Tenth Circuit's view, the regulation "simply provide[s] the details necessary to implement the statutory right created by [§ 12132] of the ADA." 348 F.3d at 858. This conclusion is consistent with the federal government's, view that the "common problem" of a city's failure to prepare a transition plan leads to the denial of city services, programs, and activities to individuals with disabilities, the very problem that Congress tried to correct by enacting § 12132. Common Problems, *supra*.

The importance of the issue presented and the millions of individuals it affects counsel strongly in favor of this Court's resolution of the split in authority. In circuits such as the First, Sixth, and Ninth, that have held there is no private right of action to enforce § 35.150(d), an apparent lack of federal resources to enforce the regulation will allow cities and other local governments to ignore their duty to prevent discrimination on the basis of disability. That is how the City of Riverside has reached the year 2010, some 15 *years* after it was supposed to be ADA compliant, with thousands upon thousands of physical barriers to access still in place. Wasteful litigation over the question presented also is sure to occur in circuits that have not yet addressed the issue. This Court should grant certiorari now to resolve the conflict and ensure that the ADA is uniformly applied throughout the country.

## II. The Ninth Circuit's decision contravenes the text of the Americans with Disabilities Act and this Court's decision in *Sandoval*.

Congress clearly expressed its intent in the ADA to provide a private cause of action to enforce the transition-plan regulation. Indeed, Congress specifically authorized the regulation in the statutory text to give effect to the ADA's prohibition on discrimination against persons with a disability.

*First*, Congress in the ADA prohibited public entities from discriminating against persons with a disability: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. As the Ninth Circuit noted, "[t]his

prohibition against discrimination is universally understood as a requirement to provide 'meaningful access.'" App. 10a. The City of Riverside admits it is a public entity subject to this prohibition.

*Second*, Congress provided a private right of action to enforce the ADA's prohibition against discrimination. The section immediately following the prohibition, a section entitled "Enforcement," states that "[t]he remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133. The Ninth Circuit agrees that "[§ 12132] is enforceable through a private right of action," App. 9a, and the City has not disputed that point.

*Third*, Congress directed the Attorney General to promulgate regulations to implement the ADA's discrimination prohibition, and that direction specifically called for regulations requiring transition plans. Section 12134(a) states that "the Attorney General shall promulgate regulations . . . that implement this part"—with "this part" referring to § 12131 through § 12134. Accordingly, the Attorney General promulgated in 28 C.F.R. Part 35 regulations that state that "[t]he purpose of this part"—consisting of 28 C.F.R. § 35.101 to § 35.189—"is to effectuate subtitle A of title II of the Americans with Disabilities Act"—i.e., 42 U.S.C. § 12131 through § 12134—"*which prohibits discrimination* on the basis of disability by public entities." 28 C.F.R. § 35.101 (emphasis added). This statement of purpose demonstrates the Attorney General's interpretation that *all* of the regulations in Part 35, including both its

"[g]eneral prohibitions against discrimination," *id.* § 35.130, and its regulations addressing "[e]xisting facilities" and transition plans, *id.* § 35.150, effectuate the prohibition against discrimination found in 42 U.S.C. § 12132. See *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001) ("[R]egulations, if valid and reasonable, authoritatively construe the statute itself." (citing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984))). In other words, the Attorney General promulgated these regulations under § 12132, and that interpretation of the ADA, as reflected in 28 C.F.R. § 35.101, is entitled to *Chevron* deference.

Furthermore, Congress went so far as to specify the content of those regulations: "with respect to 'program accessibility, existing facilities' . . . , such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations." 42 U.S.C. § 12134(b). By referring to 28 C.F.R. Part 39, which includes regulations promulgated under the Rehabilitation Act, Congress thus purposely referred to 28 C.F.R. § 39.150, which (as echoed in the text of § 12134(b)) is entitled "Program accessibility: Existing facilities." And as the following chart shows, the Attorney General followed Congress's express directive by adopting in § 35.150(d) a regulation that was consistent with—and in fact extremely similar to—28 C.F.R. § 39.150.

| 28 C.F.R. § 39.150 (Rehabilitation Act) | 28 C.F.R. § 35.150 (ADA) |
|---|---|
| (d) Transition plan. In the event that structural changes to facilities will be undertaken to | (d) Transition plan. (1) In the event that structural changes to facilities will be under- |

| | |
|---|---|
| achieve program accessibility, the agency shall develop, by April 11, 1985, a transition plan setting forth the steps necessary to complete such changes. . . . | taken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. . . . |
| The plan shall, at a minimum– | (3) The plan shall, at a minimum– |
| (1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons; | (i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities; |
| (2) Describe in detail the methods that will be used to make the facilities accessible; | (ii) Describe in detail the methods that will be used to make the facilities accessible; |
| (3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and | (iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and |

| | |
|---|---|
| (4) Indicate the official responsible for implementation of the plan. | (iv) Indicate the official responsible for implementation of the plan. |

Congress thus specifically indicated through the plain text of 42 U.S.C. § 12134 its intent to implement § 12132's anti-discrimination provision by requiring public entities to prepare and implement transition plans, and Congress even required that such plans meet certain requirements. Despite the fact that § 12134 specifically directs the Attorney General to implement § 12132 by adopting transition-plan regulations, the Ninth Circuit never addressed § 12134 in its opinion.

*Fourth*, this Court has explained that when Congress creates a private right of action to enforce a statute, it necessarily intends to create a private right of action to enforce regulations implementing that statute. In *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), this Court stated that "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute [i.e., the regulation] to be enforced as well." *Id.* Here, Congress specifically created a right that implements § 12132 by directing the Attorney General to promulgate regulations requiring a transition plan, thereby demonstrating that Congress intended both to create the right to a transition plan, see 42 U.S.C. § 12134, *and* a private right of action to enforce the transition plan, see *id.* § 12133. And the authoritative regulations do just that by "effectuat[ing]" the prohibition against "discrimination on the basis of disability by public entities" by requiring public entities to "develop a transition plan." See 28 C.F.R. §§ 35.101 & 35.150(d). Just as this Court in *Sandoval* did "not

doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section," 532 U.S. at 284, here too there should be no doubt that the transition-plan regulations implementing § 12132's ban on discrimination fall squarely within a cause of action to enforce § 12132. Under *Sandoval*, therefore, Congress intended to provide a private right of action to enforce the ADA transition-plan regulations. *Chaffin*, 348 F.3d at 858 ("The [transition-plan] regulations simply provide the details necessary to implement the statutory right created by § 12132 of the ADA. They do not prohibit otherwise permissible conduct.") (citation omitted).

In its decision below, the Ninth Circuit acknowledged that "regulations effectuating the statute's clear prohibitions or requirements are enforceable through the statute's private right of action." App. 9a. That acknowledgment should have been the end of its analysis, because the transition-plan regulations effectuate rights specifically laid out in the text of the ADA. See 42 U.S.C. §§ 12132, 12134. But in spite of the clear language of the ADA, the Ninth Circuit concluded that the ADA transition-plan regulation "is not enforceable through [§ 12132's] private right of action because the obligations it imposes are nowhere to be found in [§ 12132's] plain language." App. 11a. The Ninth Circuit reached this conclusion only by ignoring § 12134 and by misreading *Sandoval*.

In *Sandoval*, this Court considered whether Title VI regulations prohibiting a disparate impact could be enforced through a private right of action granted under a statute that forbade only intentional discrimination. "Both the Government and respondents

argue[d] that the *regulations* contain rights-creating language and so must be privately enforceable," but this Court explained that the right must be created by statutory text. 532 U.S. at 291. Noting that "§ 601 prohibits only intentional discrimination," *id.* at 280, this Court concluded that § 601 did not create a right to be free from a disparate impact: "It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore [make] clear that the private right of action to enforce § 601 does not include a private right of action to enforce these regulations." *Id.* at 285. After analyzing the statute, this Court "found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602." *Id.* at 291. "Language in a regulation," this Court continued, "may invoke a private right of action that Congress through statutory text created, but it may not create a right Congress has not." *Id.*

In contrast here, Congress did, through the statutory text, create the right to a transition plan. Section 12134 specifically provides that the regulations "implement this part," which includes § 12132, and expressly requires the ADA regulations to be consistent with the Rehabilitation Act regulations that require a transition plan. See 42 U.S.C. § 12134(b) ("[S]uch regulations shall be consistent with regulations . . . in [28 C.F.R. part 39]."); see also 28 C.F.R. § 39.150(d) (requiring agencies to develop . . . a transition plan setting forth the steps necessary to complete such changes"). And § 12133 creates a private right of action to address violations of § 12132. Furthermore, the Attorney General authoritatively interpreted § 12134's specific requirement that he adopt transition-plan regulations as effectuating

§ 12132's discrimination prohibition. Under *Sandoval*, then, Congress's clear intent to create a private right of action to enforce the discrimination prohibition demonstrates that it also intends that the regulation implementing that prohibition be enforceable by a private right of action.

The Ninth Circuit also based its ruling on the conclusion that "[t]he existence or non-existence of a transition plan does not, by itself, deny a disabled person access to a public entity's services, nor does it remedy the denial of access." App. 10–11a. That argument disregards the fact that Congress created the right to a transition plan in the ADA and authorized aggrieved individuals to seek an injunction enforcing that right. And the facts of this case demonstrate exactly why Congress imposed this requirement. Congress placed the burden on public entities to "[i]dentify physical obstacles . . . that limit" accessibility, 28 C.F.R. § 35.150(d)(3)(i), so that an individual with a disability would not have to encounter dangerous or impassible obstacles during the course of ordinary life, and then be forced to litigate each one on a case-by-case basis to provide access. Accord Common Problems, *supra*. In short, Congress required public entities to provide a roadmap through the minefield, not just a right to sue after stepping on a mine.

Here, for example, because the City violated the regulation by failing to complete its transition plan by July 26, 1992 and by failing to take steps necessary to achieve compliance with the plan, 28 C.F.R. § 35.150(d)(3), Mr. Lonberg has spent the last 18 years of his life risking tipping over in his wheelchair, getting stuck, or getting hit by traffic when he cannot travel on the sidewalks, without even being

provided information about which intersections and sidewalks to avoid. This case demonstrates Congress's wisdom in allowing private citizens to sue to require a city to develop a transition plan, rather than requiring such citizens to themselves identify and be injured by each individual obstacle before they could seek redress.

The Ninth Circuit also contended that "a public entity may be fully compliant with [§ 12132] without ever having drafted a transition plan, in which case, a lawsuit forcing the public entity to draft such a plan would afford the plaintiff no meaningful remedy." App. 11a. That is of course not this case, but in any event, the transition-plan regulation does not apply when a public entity is fully compliant: a transition plan is necessary only "[i]n the event that structural changes to facilities will be undertaken to achieve program accessibility." 28 C.F.R. § 35.150(d). Thus, a fully compliant public entity would not need to make structural changes and would not need to develop a transition plan. And while the Ninth Circuit correctly notes that a public entity with a transition plan could still violate § 12132, that does not justify disregarding this statutorily created requirement. Moreover, having the plan would both provide individuals with a disability with notice of the obstacles remaining in their community, which would help them avoid the obstacles, and would provide those individuals with the right to participate in the process of prioritizing the removal of the obstacles. 28 C.F.R. § 35.150(d). Having a transition plan would give effect to those rights.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2010

## APPENDIX
## TABLE OF CONTENTS


Page

A. Opinion of the United States Court of Appeals for the Ninth Circuit (June 26, 2009) ..... 1a

B. Order of the United States District Court for the Central District of California Granting Permanent Injunction (Mar. 21, 2006) ..... 15a

C. Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California (Mar. 17, 2006) ..... 17a

D. Order of the United States District Court for the Central District of California Granting Plaintiff's Motion for Partial Summary Judgment (June 12, 2000) ..... 33a

E. Order of the United States Court of Appeals for the Ninth Circuit Calling for a Response to the Petition for Rehearing En Banc (July 17, 2009) ..... 58a

F. Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc (Jan. 15, 2010) ..... 59a

## APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| JOHN LONBERG, an individual,<br>*Plaintiff-Appellee*,<br>v.<br>CITY OF RIVERSIDE, a municipal corporation,<br>*Defendant-Appellant.* | No. 06-55781<br>D.C. No. CV-97-00237-SGL<br>OPINION |

Appeal from the United States District Court
for the Central District of California
Stephen G. Larson, District Judge, Presiding

Argued and submitted
February 2, 2009—Pasadena, California

Filed June 26, 2009

Before: Cynthia Holcomb Hall, Barry G. Silverman and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Callahan;
Dissent by Judge Silverman

## COUNSEL

Gregory F. Hurley and Stacey L. Herter of Greenberg Traurig, LLP, Costa Mesa, California, for the defendant-appellant.

Terry J. Kilpatrick, San Luis Obispo, California, and Page Wellcome, Cardiff-by-the-Sea, California, for the plaintiff-appellee.

## OPINION

CALLAHAN, Circuit Judge:

In 1997, John Lonberg ("Lonberg"), a paraplegic, initiated a lawsuit against the City of Riverside ("City"), alleging violations of the Americans with Disabilities Act ("ADA") and its accompanying regulations. The district court divided the lawsuit into three phases. Phase one, the only phase at issue in this appeal, concerns Lonberg's claim that the City's plan to achieve ADA compliance did not meet the standards set forth in 28 C.F.R. § 35.150(d). The district court granted Lonberg's request for a permanent injunction and ordered the City to prepare a transition plan that complies with Section 35.150(d). The City appeals, arguing that Section 35.150(d) is not privately enforceable.

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), *see Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 984 (9th Cir. 2007), and we REVERSE and VACATE the permanent injunction.

### I.

During the first phase of this lawsuit, Lonberg moved for partial summary judgment regarding the City's alleged non-compliance with Section 35.150(d), which requires public entities to develop a "transi-

tion plan" for achieving the ADA's accessibility requirements.[1] On June 12, 2000, the district court granted Lonberg's motion, concluding that the City

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[1] 28 C.F.R. § 35.150(d) provides, in relevant part, as follows:

> Transition Plan. (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.
>
> (2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs,
>
> . . . .
>
> (3) The plan shall, at a minimum —
>
> (i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
>
> (ii) Describe in detail the methods that will be used to make the facilities accessible;
>
> (iii) Specify the schedule for taking the steps necessary to achieve compliance with this Section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and
>
> (iv) Indicate the official responsible for implementation of the plan.

had failed to comply with Section 35.150(d). Significantly for purposes of this appeal, in granting Lonberg's motion the district court commented in a footnote that "[p]laintiff ha[d] not requested any specific remedy in connection" with his motion, "and in particular [did] not request[] injunctive relief."

Lonberg subsequently moved for a preliminary injunction directing the City to prepare an adequate transition plan. For reasons that are not clear from the record before us, the district court deemed Lonberg's motion moot, and set a bench trial for May 2001 on the adequacy of the City's transition plan. Nearly five years after the trial, on March 17, 2006, the district court issued findings of facts and conclusions of law in Lonberg's favor.[2] The court found numerous faults with the City's transition plan, including its purported failure to sufficiently identify particular physical obstacles limiting accessibility to the City's streets, intersections, sidewalks and crosswalks. It also faulted the plan for, among other things, failing to describe in sufficient detail the methods the City would use to achieve accessibility. Accordingly, the district court entered a permanent injunction requiring the City to "prepare a transition plan that complies with the ADA and § 35.150."

After the district court entered the permanent injunction, the City moved for a new trial, arguing for the first time that Section 35.150(d) is not enforceable through a private cause of action. Despite

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[2] While the parties litigated "phase one," Lonberg also pursued his claims for damages and injunctive relief in connection with the City's alleged failure to make its sidewalks and curb ramps accessible.

Lonberg's objection that the City had waived any such argument, the district court denied the City's motion on its merits, holding that "Lonberg does have a private right of action . . . for injunctive relief compelling the City to comply with its obligations under Section 35.150(d)."

II.

The City appeals, seeking to vacate the permanent injunction based on Lonberg's alleged lack of standing to privately enforce Section 35.150(d).

A.

[1] On appeal, Lonberg maintains that the City has waived its challenge regarding the enforceability of Section 35.150(d) by failing to raise it until after trial. Specifically, he asserts that the City's challenge is a waivable Rule 12(b)(6) defense. *See* Fed. R. Civ. P. 12(h)(2) (providing that a Rule 12(b)(6) defense must be raised no later than trial.) Although the City's challenge may be characterized as a Rule 12(b)(6) defense, it also implicates the legal validity of the injunction. We have, in the past, addressed such issues even where they were not timely raised below, and we conclude that it is a proper exercise of our discretion to do so here. *Cf. Price v. City of Stockton*, 390 F.3d 1105, 1108 (9th Cir. 2004) (reaching the issue of whether a statute created a private right of action even when the district court failed to address it in the first instance); *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1114 (9th Cir. 2006) (exercising discretion to reach a purely legal issue that plaintiffs raised only during oral argument before the district court).

[2] Reaching the merits of this issue results in no harm to Lonberg, since he had an opportunity to brief this issue fully in district court.[3] Indeed, the district court declined to find waiver, and addressed this issue on its merits, adopting the Tenth Circuit's view that Section 35.150(d) is privately enforceable. *See Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003). Accordingly, we conclude that this issue, which was raised below and addressed on its merits by the district court, and which underpins the validity of the injunction at issue, is properly before us for a determination on the merits.

B.

We review de novo whether a statute or regulation creates a private cause of action. *Townsend v. Univ. of Alaska*, 543 F.3d 478, 482 (9th Cir. 2008). Whether Section 35.150(d) creates a private right of action is an issue of first impression in this court, and one on which other circuits have split. *Chaffin*, 348 F.3d at 858 (holding that Section 35.150(d) creates a private right of action); *Ability Ctr. Of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004) (holding that Section 35.150(d) does not create a private right of action); *Iverson v. City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006) (same). We agree with the First and Sixth Circuits and hold that Section 35.150(d) does not create a private right of action.

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[3] Moreover, as noted below, we conclude that Lonberg's remedy lies not in the enforcement of a transition plan, but in the removal of barriers to meaningful access.

1. *Alexander v. Sandoval*

The Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), governs our analysis, as it sets forth the framework for determining whether a federal regulation is enforceable through a private right of action.

In *Sandoval*, a class of non-fluent English speakers sued the Alabama Department of Public Safety, alleging that its administration of an English-only driver's license test violated 28 C.F.R. § 42.104(b)(2),[4] "because it had the effect of subjecting non-English speakers to discrimination based on their national origin." 532 U.S. at 278-79. The Court reversed an injunction requiring the department to accommodate non-English speakers, holing that 28 C.F.R. § 42.104(b)(2) was not enforceable through a private cause of action. *Id.* at 293.

[3] The Court explained that "private rights of action to enforce federal law must be created by Congress . . ., [and that] [t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* at 286 (internal citations omitted).

The relevant statute in *Sandoval* was § 601 of Title VI of the Civil Rights Act of 1964, as it was the statute that § 42.104(b)(2) was meant to implement.[5]

---

[4] 28 C.F.R. § 42.104(b)(2) prohibits a recipient of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ."

[5] Section 42.104(b)(2) was promulgated under § 602 of Title VI of the Civil Rights Act of 1964, which authorizes federal

[Footnote continued on next page]

*See id.* at 278. Section 601 bans recipients of federal funding from intentionally discriminating against individuals "on the ground of race, color, or national origin" in connection with any program or activity covered by Title VI. *Id.* (citing 42 U.S.C. § 2000d). The Court noted that Congress clearly intended § 601 to be enforceable through a private right of action, *see id.* at 280 (citing 42 U.S.C. § 2000d-7, which "expressly abrogated States' sovereign immunity against suits brought in federal court to enforce Title VI"), but determined that this cause of action did not extend to all the regulations meant to implement it.

In determining whether a particular regulation is enforceable through a statute's private right of action, the Court explained that we must look to the statute itself and determine whether it displays Congress's intent to create the private right purportedly contained in the regulation. *Id.* at 286. The Court stated that absent such intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

The Court determined that § 601 only banned intentional discrimination, and said nothing about activities that may have a discriminatory effect. Accordingly, it held that the disparate-impact regulations, though perhaps otherwise valid, were not enforceable through § 601's private cause of action

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[Footnote continued from previous page]
agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." *Sandoval*, 532 U.S. at 278 (quoting 42 U.S.C. § 2000d-1).

because they did not "simply apply § 601['s]" ban on intentional discrimination and instead "forbid conduct that § 601 permits." *Id.* at 285. In other words, because the plain language of § 601 only banned intentional discrimination, only those regulations effectuating that ban could be enforced through § 601's private cause of action. To hold otherwise, the Court reasoned, would allow "language in a regulation . . . [to] conjure up a private cause of action that has not been authorized by Congress." *Id.* at 291.

[4] Thus, *Sandoval* instructs that because only Congress can create a private right of action through statute, we must examine a challenged regulation in the context of the statute it is meant to implement. Only those regulations effectuating the statute's clear prohibitions or requirements are enforceable through the statute's private right of action; regulations that do not encapsulate the statutory right and corresponding remedy are not privately enforceable.

2. *Application of* Sandoval *to Section 35.150(d)*

[5] In determining whether Section 35.150(d) is enforceable through a private right of action, we look to the statute it is meant to implement: § 202 of Title II of the ADA, which prohibits discrimination by public entities on the basis of disability.[6] Section 202 is enforceable through a private right of action, *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 906 (6th Cir. 2004), (citing *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002)), and provides

---

[6] Section 35.150(d) was promulgated by the Attorney General pursuant to § 204 of the ADA, 42 U.S.C. § 12134, in order to implement § 202. *See* 28 C.F.R. § 35.101.

that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1990).

[6] The plain language of § 202 prohibits public entities *from* discriminating against qualified disabled individuals in its administration of services and programs. This prohibition against discrimination is universally understood as a requirement to provide "meaningful access." *See, e.g., Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008) (noting that the ADA requires reasonable modifications necessary to ensure "meaningful access") (citing *Southeastern Comty. College v. Davis*, 442 U.S. 397, 410 (1979)); *Ability Ctr.*, 385 F.3d at 913 (noting Title II's express aim of providing meaningful access by requiring public entities to alter city streets and sidewalks); *Chaffin*, 348 F.3d at 857 (noting its prior holding that "the ADA requires public entities to provide disabled individuals '*meaningful* access'"). Section 202 says nothing about a public entity's obligation to draft a detailed plan and schedule for achieving such meaningful access, nor does it create a private right to such a plan.

[7] Further, and perhaps most importantly, nothing in the language of § 202 indicates that a disabled person's *remedy* for the denial of meaningful access lies in the private enforcement of Section 35.150(d)'s detailed transition plan requirements. *See Sandoval*, 532 U.S. at 286 (emphasizing that the operative statute must display "an intent to create not just a private right but also a private remedy"). The existence or non-existence of a transition plan

does not, by itself, deny a disabled person access to a public entity's services, nor does it remedy the denial of access.[7] Indeed, a public entity may be fully compliant with § 202 without ever having drafted a transition plan, in which case, a lawsuit forcing the public entity to draft such a plan would afford the plaintiff no meaningful remedy. *See Ability Ctr.*, 385 F.3d at 914; *see Iverson*, 452 F.3d at 101. Conversely, a public entity may have a transition plan that complies with Section 35.150(d), but may still be in violation of § 202 by, for example, failing to alter its sidewalks in a way that provides meaningful access.

[8] We do not suggest that Section 35.150(d) is invalid or an otherwise improper exercise of agency discretion. We simply conclude that under *Sandoval*, it is not enforceable through § 202's private right of action because the obligations it imposes are nowhere to be found in § 202's plain language. Moreover, requiring a public entity to create a transition plan does not directly remedy a denial of § 202's right to meaningful access.

Our conclusions are consistent with the approach outlined by the Sixth Circuit in *Ability Center* and adopted by the First Circuit in *Iverson*. *Ability Ctr.*, 385 F.3d at 914; *Iverson*, 452 F.3d at 100-01.

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[7] Tellingly, in his 2001 motion for partial summary judgment with respect to the City's transition plan, Lonberg sought no remedy other than a declaration that the City was not in compliance with the regulation. Had Section 35.150(d) been the true vehicle to right the wrongs caused by the City's alleged ADA violations, Lonberg might have asked for some actual relief in connection with his first attempt to enforce that regulation.

Although the Tenth Circuit held otherwise in *Chaffin*, it did not address whether § 202 evinced congressional intent to create a private right to a transition plan, or whether such a plan would remedy the denial of meaningful access. Instead, it applied *Sandoval* broadly to a host of ADA regulations, and without addressing each one individually concluded that they all "simply provide[d] the details necessary to implement the statutory right created by § [202] . . . of the ADA," and did "not prohibit otherwise permissible conduct." *Chaffin*, 348 F.3d at 854, 857-58 (holding that 28 C.F.R. §§ 35.150, 35.151, and the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), 28 C.F.R. pt. 36, app. A, were all privately enforceable).

It is true that Section 35.150(d) does not "prohibit" conduct that is otherwise permissible under § 202 as the challenged regulation in *Sandoval* did with respect to § 601 of Title VI of the Civil Rights Act. However, we read *Sandoval* to require a more particularized review of the challenged regulation than was undertaken by the Tenth Circuit in *Chaffin*, in addition to a determination of whether the regulation effectuates the statutory right and corresponding remedy. As set forth above, the application of this requisite inquiry with respect to 35.150(d) leads us to conclude that it is not enforceable through § 202's private right of action. This holding does not preclude another panel from finding that other regulations promulgated to effectuate § 202 are privately enforceable, nor does it prevent Lonberg from pursuing his pending claims for damages and injunctive relief raised in the other phases of this litigation. Indeed, to the extent the City is in violation of the ADA and its attendant regulations, Lonberg's true remedy would lie in an injunction

requiring the actual removal of barriers that prevent meaningful access.

III.

[9] Based on the foregoing, we hold that 28 C.F.R. § 35.150(d) is not enforceable through the private right of action under § 202 of Title II, 42 U.S.C. § 12132, and we REVERSE and VACATE the district court's permanent injunction.

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SILVERMAN, Circuit Judge, dissenting:

Because I believe the City of Riverside waived its argument that 28 C.F.R. § 35.150(d) is not privately enforceable, I dissent.

The City did not raise this defense in its answer, in a motion to dismiss, in a motion for summary judgment, or even at trial. Instead, the City waited until *after trial* — after the district court issued a decision in Lonberg's favor — to argue for the first time in a motion for new trial that § 35.150(d) is not privately enforceable. Even worse, after Lonberg argued in his opening brief to us that the City had waived this argument by not raising it before trial, the City offered not one word of rebuttal about the waiver argument. It seems to me the City has doubly waived its argument — it did not raise it prior to trial in the district court and it failed to reply to the waiver argument made before us in the court of appeals.

Under Federal Rule of Civil Procedure 12(h)(2), a Rule 12(b)(6) defense must be raised at or before trial. Here, the City raised its defense after the trial concluded *and* after the district court rendered a decision against it, even though "the City's [defense]

may be characterized as a Rule 12(b)(6) defense," as the majority itself acknowledges.

Even if we have the discretion to reach this issue notwithstanding the City's failure to perfect it below, I do not see why we should. The City's belated assertion of this new defense is most unfair to Lonberg who prevailed at trial in the face of the defenses that *were* raised and litigated. Why should the City be allowed to wait until it loses and then get another chance to raise an entirely new non-jurisdictional defense that was perfectly available before? This makes a mockery of the rules of civil procedure requiring that claims and defenses be timely raised. There are good reasons for these rules, too — like fairness and avoidance of surprise.

What is the City's answer to Lonberg's assertion that the new argument has been waived? Nothing. Not a word. In its brief before us, the City offered no explanation whatsoever for its failure to raise its argument earlier, or even a justification for why the argument has *not* been waived. The City's brief is totally silent in response to Lonberg's claim of waiver. This failure alone counsels against the exercise of discretion to consider the City's new-found position at this late date.

I would affirm.

## APPENDIX B

### UNITED STATES DISTRICT COURT
### CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| JOHN LONBERG,<br>Plaintiff,<br>v.<br>CITY OF RIVERSIDE,<br>Defendant. | CASE NO. EDCV 97-00237-RT(AJWx)<br>PERMANENT INJUNCTION |

On March 17, 2006, the Court filed its Findings of Fact and Conclusions of Law finding and concluding that defendant City of Riverside ("City")'s Transition Plan for its streets and sidewalks is inadequate and not in compliance with the requirements of the American With Disabilities Act, 42 USC 12131 *et seq.* ("ADA"), and its implementing regulations entitled "Non Discrimination On The Basis Of Disability In State And Local Government Services" and particularly Section 35.150 of Title 28, Code of Federal Regulations (Section 35.150).

IT IS HEREBY ORDERED that Defendant City of Riverside shall prepare a Transition Plan that complies with the ADA and §35.150. The City's Transition Plan shall include among other things:

1. a schedule for providing curb ramps where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the ADA, including state and local government offices and facilities, transportation, places of public accommodation, and

employers, followed by walkways serving other areas;

2. identify physical obstacles on the City's streets and sidewalks, including existing curb ramps, that limit accessibility of such streets and sidewalks to individuals with disabilities;

3. describe in detail the methods that will be used to make the streets and sidewalks, including existing curb ramps, accessible to persons with disabilities; and

4. specify the schedule for taking the steps necessary to achieve compliance with Section 35.150 and, if the time period of the Transition Plan is longer than one year, identify steps that will be taken during each year of the Transition Period.

In regarding to the identification of physical obstacles on the City's streets and sidewalks, the Transition Plan shall identify those areas on the City's streets and sidewalks, including existing curb ramps, that fail to meet the current applicable design standards in §§ 4.3 through 4.8 of the American with Disabilities Act Accessibility Guidelines ("ADAAG") found at 28 C.F.R. Part 36, Appendix A.

IT IS FURTHER ORDERED that the City shall prepare and complete an adequate Transition Plan consistent with this injunction and the Court's Findings of Fact and Conclusions of Law no later than July 24, 2006.

Dated: March 21, 2006

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| JOHN LONBERG,<br>Plaintiff,<br>v.<br>CITY OF RIVERSIDE,<br>Defendant. | CASE NO. EDCV 97-00237-RT(AJWx)<br>FINDINGS OF FACT AND CONCLUSIONS OF LAW |

The case is now before the Court on Plaintiff's Motion for a Permanent Mandatory Injunction direction. Having heard the testimony offered by the parties at trial and the argument of counsel, and after reviewing the documentary evidence, the Court makes the following Findings of Fact and Conclusions of Law based on the credible evidence and the reasonable inferences to be drawn therefrom.

If certain findings of fact more correctly should be conclusions of law and if certain conclusions of law more correctly should be findings of fact, then each entry so designated is deemed to be the other.

### FINDINGS OF FACT

1. Plaintiff John Lonberg ("Lonberg"), is a resident of the City of Riverside and a paraplegic who is required to use a wheelchair for mobility.

2. Defendant City of Riverside ("City"), is a municipal corporation and charter city of the State of California that employs more than 50 people.

3. Lonberg is required to use a wheelchair for mobility and he uses both manual and battery-powered wheelchairs.

4. Lonberg uses the streets and sidewalks in the City on a regular and ongoing basis. Among other things, Lonberg uses the streets and sidewalks to:

(A) travel to public hearings;

(B) investigate disability access complaints;

(C) go shopping;

(D) take his grandchildren to sporting events;

(E) patrol the streets as a Handicap Parking Patrol Officer;

(F) perform work as a disability access consultant;

(G) go to restaurants and attend social functions;

(H) accompany his grandchildren to a school; and

(I) regularly go to Kaiser Hospital, which is located several blocks from his house.

5. There are approximately 5,100 street intersections and 1,100 miles of sidewalks in the City. Assuming an average of four curb returns per intersection, there are approximately 20,000 curb returns throughout the City.

6. Based on surveys prepared by City's staff, there are thousands of physical obstacles on the

City's streets and sidewalks including 7,400 areas missing curb ramps[1] for wheelchairs, and numerous existing curb ramps that are either in disrepair of otherwise not constructed in compliance with state and federal design requirements. Additionally, City has identified thousands of physical obstacles on City's sidewalks, including such things as missing sidewalks, sidewalks that are too narrow, sidewalks with gaps or ledges greater than one-inch, and sidewalks with cross-slopes greater than two percent.

7. Lonberg travels in his wheelchair on certain streets and sidewalks of City on a daily basis and in so doing he regularly encounters physical obstacles on those streets and sidewalks that make it difficult or impossible for him to traverse them. These obstacles prevent Lonberg from using certain City streets and sidewalks, or require him to expend a significant amount of physical energy or to risk his health and safety by going around or through the obstacles.

8. An improperly designed curb ramp is a source of delay and frustration as persons in wheelchairs must circumvent the curb ramp or expend a significant amount of additional time and energy to force their way through or around the obstacle. These problems are compounded by the fact that the obstacles are difficult to see, particularly at night. In those instances, Lonberg is at great risk of tipping over, getting stuck, damaging his wheelchair, or having to risk his safety by traveling in the street. City's preliminary findings refer to thousands of physical obstacles on the City's streets and sidewalks. The

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[1] Another term for curb ramps is "curb cuts".

challenges that Lonberg faces due to these obstacles cause him irreparable harm.

9. On June 12, 2000, the Court granted Plaintiff's Motion for Summary Judgment concluding as a matter of law that City did not have an adequate Transition Plan "within the meaning of Section 35.150(d) regarding structural alteration of its street facilities to achieve program accessibility by disabled persons"

10. Subsequently, on November 28, 2000, the City adopted a document entitled "Amendment to the City's Transition Plan" (Exhibit 593). This document contains City policies to eliminate physical obstacles on City's streets and sidewalks associated with the need to construct new curb ramps where sidewalks cross curbs at intersections and to replace or modify existing curb ramps, including the following:

> (A) Wheelchair ramps will be installed at locations where none exist whenever a roadway undergoes pavement rehabilitation or replacement.
>
> (B) Existing wheelchair ramps that are not in compliance with today's ADA standards will be replaced or modified whenever a roadway undergoes pavement rehabilitation or replacement.
>
> (C) Each year the City will appropriate funding for providing wheelchair ramps where sidewalks cross curbs.
>
> (D) The City will continue to work with the Advisory Committee on Disability Access Issues in prioritizing the yearly implementation of the City's ADA Transition Plan for each year during the transition period.

(E) A wheelchair ramp will be installed whenever a new curb is constructed causing a sidewalk to cross the curb.

(F) A wheelchair ramp will be installed whenever a sidewalk that crosses a curb is repaired by removal and replacement.

(G) Wheelchair ramps will be installed at intersections whenever a new sidewalk is constructed.

(H) The installation of wheelchair ramps on all City streets will be completed by 2030.

(I) The Public Works Director is the City official responsible for implementation of the City's ADA Transition Plan for providing wheelchair ramps.

11. At approximately the same time City adopted these policies, it prepared a survey of missing curb ramps and determined there are approximately 7,400 locations throughout the City missing curb ramps.

12. On July 10, 2001, City adopted a document entitled "Amendment to ADA Transition Plan: Summary of Transition Plan For Improving Sidewalks in the Public Right of Way" (Exhibit 604). This document contains City policies regarding the construction and maintenance of sidewalks, within its public rights of way to eliminate physical obstacles therefrom, including the following:

(A) All new sidewalks will be constructed in compliance with state and federal disabled access regulations.

(B) Whenever a sidewalk is repaired by removal and replacement, a sidewalk complying

with state and federal disabled access regulations will be installed.

(C) Each year City will appropriate funding for improving additional sidewalks. That funding may be affected by the availability of state and federal funding available to the City in any given year.

(D) The City will continue to work with the City's committees on disability issues in prioritizing the yearly implementation of sidewalk improvements for each year during the transition period.

(E) The City will continue to solicit and respond to requests by citizens to install, improve or repair sidewalks within the City.

## CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action pursuant to Title 28 of the United States Code § 1331.

2. Lonberg has standing to allege his first claim of the complaint for violation of Title II of the Americans With Disabilities Act, 42 USC § 12101 *et seq.* ("ADA") by challenging the adequacy of the Transition Plan and to seek mandatory injunctive relief compelling the City to prepare an adequate Transition Plan. *Armstrong -v- Davis*, 275 F.3d 849, 861-863 (9th Cir. 2001).

3. Lonberg is a "qualified individual with a disability" as that term is defined under the Americans With Disabilities Act at 42 USC § 12131 in that he is permanently disabled and requires a wheelchair for mobility.

4. City is a public entity as that term is defined under the ADA at 42 USC § 12131 in that it is a

municipal corporation and charter city of the State of California. The City has responsibility or authority over the streets, sidewalks, roads, and walkways (hereinafter "streets and sidewalks"), in the public rights-of-way of City.

5. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC § 12132.

6. The ADA itself does not require a public entity such as City to prepare or implement a Transition Plan regarding its existing facilities. The requirement is found in Section 35.150 of Title 28 of the Code of Federal Regulations (Section 35.150), promulgated by the Department of Justice, pursuant to a congressional grant of regulatory authority contained in 42 USC § 12134(a).

7. Paragraph (a) of Section 35.150 provides that "a public entity shall operate each service, program or activity so that the service, program or activity, when viewed in its entirety, is readily accessible to and useable by individuals with disabilities . . . ."

8. The City's public streets and sidewalks, including curb ramps, constitute a service, program or activity within the meaning of Title II of the ADA and are subject to the regulations promulgated in furtherance of Title II including §35.150. *Barden, et al. -v- City of Sacramento, et al.*, 292 F.3d 1073, 1077-78 (9th Cir. 2002), *cert denied* 539 U.S. 958 (2003).

9. Section 35.150(d)(3) requires that City's Transition Plan shall, at a minimum:

i. Identify physical obstacles in [its] facilities that limit the accessibility of its programs or activities to individuals with disabilities;

ii. Describe in detail the methods that will be used to make the facilities accessible;

iii. Specify the schedule for taking the steps necessary to achieve compliance with this Section and, if the time period of the Transition Plan is longer than one year, identify steps that will be taken during each year of the transition period.

10. Section 35.150(d)(3) applies to "Facilities" as used in Section 35.150(d)(1) and to "streets, roads or walkways" as used in Section 35.150(d)(2).

11. Section 35.150 encompasses all public rights-of-way in City without a programmatic limitation.

12. The City has planned and continues to plan to undertake structural changes in its streets and sidewalks in order to comply with its obligations under Title II of the ADA and Section 35.150, and it is subject to paragraph (c) of Section 35.150 regarding the time for compliance with its obligations under Section 35.150.

13. Section 35.150(c) states that where structural changes in existing facilities will be undertaken by a public entity to comply with its obligations under Section 35.150, "such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible."

14. Section 35.150(d)(2) specifies that for curb ramps and sidewalks, changes shall be implemented by giving priority to walkways serving entities covered by the ADA, including State and local

government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

15. Even with the amendments of November 28, 2000, and July 10, 2001, to the City's Transition Plan, the City has not prepared an adequate Transition Plan as required under Title II of the ADA and those regulations promulgated thereto including the Department of Justice implementing regulations found in Section 35.150 and particularly paragraphs (c) and (d) thereof.

16. The City's surveys of the public streets, intersections, sidewalks, and crosswalks in the City regarding curb ramps to be constructed (Exhibit 611), as referenced in Exhibit 593 and its similar surveys regarding physical obstacles in the City's sidewalks and other public rights-of-way, including existing curb ramps (Exhibit 611), as referenced in Exhibit 604 so as to meet the standards of the American With Disabilities Act Accessibility Guidelines ("ADAAG"), are not sufficient to meet the minimum requirements for a Transition Plan under Section 35.150(d).

The surveys do not sufficiently identify the particular physical obstacles on the City's streets and sidewalks that limit the accessibility of such streets and sidewalks to individuals with disabilities including persons using wheelchairs, e.g., dimensional deficiencies in curb ramps, excessive cracks in the sidewalks, raised surfaces at the bottom of curb ramps, or along sidewalks in excess of 1/4 inch, subsidence in sidewalks, driveway cross slopes too steep, driveway "lips" too large.

The surveys do not describe in detail the methods that the City will use to make the streets and

sidewalks accessible to individuals with disabilities. Further the Transition Plan, including Exhibits 593 and 604, does not identify in a schedule the specific steps that will be taken during each year of the Transition Plan period, to achieve compliance with Section 35.150.

17. ADAAG[2], provides the proper standards for determining, whether or not a "physical obstacle" exist in a City street or sidewalk within the meaning of Section 35.150(d)(2) and (d)(3)(i). Curb ramps are not the only sidewalk feature to be encompassed in the Transition Plan pursuant to Section 35.150(d). SubSection (3) of Section 35.150(d) applies not only to installation of new curb ramps, but also to all physical obstacles on the streets and sidewalks of the City, including noncompliant existing curb ramps.

18. City has failed to identify in its Transition Plan any physical obstacles on the City's streets and sidewalks which include, among other things:

(A) Running Slopes and Side Flares: The City has failed to adequately identify areas in its streets and sidewalks where any running slope of curb ramps exceed 1:12 (ADAAG §§ 4.7.2, 4.8.2) and where any side flare slopes exceed 1:10 (ADAAG § 4.7.5). Even though the City's surveys note that "excessive slope" on curb ramps and side flares are physical obstacles, such notations do not relate to a specific ADAAG running slope and side flare standard.

(B) Transitions Between Curb Ramps and the Street: The City has failed to identify areas

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[2] The ADAAG can be found at 28 C.F.R., Part 36, Appendix "A."

in its streets and sidewalks where the bottom of any curb ramps are not flush with the street and free of abrupt changes. (ADAAG §§ 4.7.2)

(C) Surfaces Adjoining Curb Ramps: The City has failed to identify areas in its streets and sidewalks where any top and bottom landings of curb ramps contain slopes in excess of 1:20(5%). (ADAAG § 4.7.2)

(D) Top Landings: The City has failed to identify areas in its streets and sidewalks where any landing depth at any top of curb ramps is less than 48 inches and the side flares of such curb ramps are greater than 1:12. (ADAAG § 4.7.5 Fig. 12(a) and 12(b).)

(E) Pedestrian Crossings: The City has failed to identify areas in its streets and sidewalks, where any curb ramps are not wholly contained within marked crossings, which is a source of conflict between cars and persons in wheelchairs. (ADAAG §4.7.9)

(F) Diagonal Curb Ramps: The City has failed to identify any obstacles on diagonal curb ramps in its streets and sidewalks, including (i) the lack of edges parallel to the direction of pedestrian flow, and (ii) a minimum 48-inches of clear space at the bottom of the ramp. (ADAAG §§4.7.10)

(G) Islands: The City has failed to identify those areas in its streets where any traffic islands are not level with the street, and thus present an obstacle to a wheelchair occupant attempting to cross the street. (ADAAG §4.7.11)

19. City's Transition Plan fails to describe in detail the methods that will be used to make the City's streets and sidewalks accessible.

City's policies as stated in Exhibits 593 and 604, which are part of the City's Transition Plan, are simply reiterations of the City's obligations under the ADA and Section 35.150, but do not meet the requirements of subparts (i) and (ii) of paragraph (d)(3) of Section 35.150 as to the identification of physical obstacles and as to the detailing of methods that will be used to make the streets and sidewalks accessible.

20. "Methods" means "a way, technique, process of or for doing something." Merriam-Webster's Collegiate Dictionary, 10th Edition (2001). City's Transition Plan, including, Exhibits 593 and 604 does not state in sufficient detail the systematic processes to be used by City to install new curb ramps in its streets and sidewalks and to remove physical obstacles in its streets and sidewalks, including existing non-compliant curb ramps in order to make such streets and sidewalks accessible to persons using wheelchairs.

21. City's Transition Plan is inadequate in that it fails to specify the schedule for taking the steps necessary to achieve compliance with Section 35.150 and, because the evidence establishes that the time of the Transition Plan is longer than one year, the Plan does not identify the steps which will be taken by the City in each year of the transition period to achieve compliance. *See* 35.150(d)(3)(iii). Indeed, the only reference in the Transition Plan to a time period for complete compliance refers to installation of new curb ramps by 2030.

22. "Whenever" means "at any or every time that" or as an adverb means "at whatever time". Merriam-Webster's Collegiate Dictionary, 10th Edition (2001). As used in the City's Transition Plan and particularly in Exhibits 593 and 604 "Whenever" is insufficient to establish the specificity for the schedule or time period required under Section 35.150 and particularly Paragraphs (c) and (d)(3)(iii) thereof.

23. Section 203 of the ADA states that the remedies and procedures set forth in Section 505 of the Rehabilitation Act are the remedies available to any person alleging discrimination under the ADA. 42 USC §12133. Section 505 of the Rehabilitation Act, provides that a person who is being discriminated against is entitled to injunctive relief. 29 USC § 794a.

24. Legal remedies are inadequate to provide Lonberg with the relief he seeks by the first claim of his complaint that the City violated the ADA, 42 USC §§ 12101, *et seq.*

25. Lonberg will suffer immediate and irreparable injury if the City does not timely prepare a Transition Plan in accordance with the requirements of Section 35.150.

26. The City's failure to prepare an adequate Transition Plan in violation of Title II of the ADA and Section 35.150 as an implementing regulation constitutes a violation of a civil rights statute. When a public entity, such as the City, violates a civil rights statute it is presumed that the plaintiff has suffered irreparable injury from the fact of such violation. *Silver Sage Partners -v- City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001).

27. A permanent injunction directing the City to prepare an adequate Transition Plan will advance the public interest by fulfilling the purpose of Title II of the ADA which is to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Barden -v- City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002), cert. denied 539 U.S. 958 (2003).

28. The balance of hardships favors Lonberg in that his ability to traverse the public streets and sidewalks of the City in a wheelchair will be seriously impeded and in some instances precluded in pursuing his normal daily lifetime activities.

29. The City has not complied with the requirements for a Transition Plan under Section 35.150(d) and the doctrine of substantial compliance does not apply. *Long -v- Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001).

30. The City, over a period of years, has engaged in a pervasive pattern of violating Title II of the ADA and the regulations related thereto, including Section 35.150, by not preparing an adequate Transition Plan in accordance with the requirements of Section 35.150 and particularly Paragraphs (c) and (d) thereof.

31. The undue financial burden exception provided in Section 35.150(a)(3) to the application of paragraph (a) does not apply to the requirement that City prepare an adequate Transition Plan pursuant to paragraph (d) of Section 35.150.

32. The City filed an answer to Lonberg's complaint, but did not assert therein, 11th Amendment sovereign immunity as an affirmative defense.

It then conducted extensive discovery and filed two motions for partial summary judgment. After receiving an adverse ruling on the summary judgment motions, City first asserted a claim of 11th Amendment sovereign immunity in a trial brief almost one year after those rulings by the Court. Such conduct is incompatible with the City's intent to preserve sovereign immunity as a defense and the City, by such conduct, waived its claim to 11th Amendment sovereign immunity. *In Re Bliemeister*, 296 F.3d 858, 861-62 (9th Cir. 2002).

Even if there was no waiver by the City of a claim to 11th Amendment sovereign immunity and even if the City is considered an "arm" of the State of California, as argued by the City (which the Court does not find as a matter of fact), City is not entitled to the protection of sovereign immunity under the 11th Amendment as to Lonberg's first claim for violation of Title II of the ADA because Congress expressly abrogated state sovereign immunity under Title II. *Miranda B. -v- Kitzhaber*, 328 F.3d 1181, 1184-5 (9th Cir. 2003); *Hason -v- Medical Board of California*, 279 F.3d 1167, 1170-1 (9th Cir. 2002), rehearing *en banc* denied 294 F.3d 1166 (9th Cir. 2002), and cert. dismissed 538 U.S. 958 (2003); *see Phiffer -v- Columbia River Correctional Institute*, 384 F.3d 791, 792-93 (9th Cir. 2004).

33. Lonberg is entitled to a permanent injunction directing the City to prepare an adequate Transition Plan for existing facilities including its streets and sidewalks as required under Title II of the Americans with Disabilities Act 42 USC §12101 *et seq.* ("ADA"), and its implementing regulation 28 C.F.R. §35.150, issued by the U.S. Department of Justice.

Dated: 3/17/06

## APPENDIX D

### UNITED STATES DISTRICT COURT
### CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| JOHN LONBERG,<br>Plaintiff,<br>v.<br>CITY OF RIVERSIDE,<br>Defendant. | CASE NO. EDCV 97-00237-RT(AJWx)<br>ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT |

The Court, the Honorable Robert J. Timlin, has read and considered plaintiff John Lonberg (plaintiff)'s motion for partial summary judgment ("motion"), defendant City of Riverside (defendant or the City)'s opposition thereto, and plaintiff's reply, as well as the admissible evidence.

### I.
### BACKGROUND

This action is brought under Title II of the Americans with Disabilities Act (ADA) and related regulations, as well as under section 54 of the California Unruh Act. It concerns the City establishing wheelchair accessible curb ramps (curb cuts) on city streets.[1] This motion concerns only the

[1] "The lack of curb cuts is a primary obstacle to the smooth integration of those with disabilities into the commerce of daily

[Footnote continued on next page]

question of the City's compliance or noncompliance with one federal regulation-28 C.F.R. § 35.150(d)-which requires certain municipalities to prepare and implement a "transition plan" detailing their plans to comply with the ADA as to those municipal facilities, including city streets, that were in existence prior to January 26, 1992 (transition plan).[2] Plaintiff simply moves for partial summary judgment on the issue whether or not defendant has prepared an adequate transition plan.

## II.
## EVIDENTIARY OBJECTIONS

Plaintiff objects to certain evidence submitted by defendant. The rulings are as follows:

1. DOT letter—Overruled. The Plaintiff fails to set forth admissible evidence to support the material facts concerning defendant's purported failure to produce the letter. Furthermore, the letter and

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[Footnote continued from previous page]
life. Without curb cuts, people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors." *Kinney v. Yerusalim*, 9 F.3d 1067, 1069 (3d Cir.1993).

[2] Contrary to the thrust of a substantial portion of the parties' briefing, the motion does not involve the questions of defendant's compliance with 28 C.F.R. § 35.105, which requires public entities to have conducted a self-evaluation prior to January 26, 1993, or with defendant's compliance with the substantive anti-discrimination provisions of Title II of the ADA or related Department of Justice regulations.

supporting documents are admissible for certain purposes under Rule 803(8)(C) (governmental fact-finding exception) and are properly authenticated.

2A. Sustained—the regulations speak for themselves.

2B. Overruled

2C. Overruled.

2D. Overruled.

2E. Sustained as to the first sentence of ¶ 12; otherwise overruled.

2F. Overruled.

2G. Overruled.

2H(1). Sustained—document is not properly authenticated.

2H(2). Overruled.

3. Jason Douglas White's Supplemental Declaration: The motion to strike is denied. The objections are sustained on all the bases stated by the plaintiff.

Defendant objects to certain evidence submitted by plaintiff. The rulings are as follows:

A. Objection to Exhibit E of Declaration of Terence Kilpatrick-Sustained. The document is not properly

authenticated, and constitutes impermissible hearsay.

B. Objections to Declaration of John Lonberg ("Lonberg")

1. Sustained—the paragraph states inadmissible legal opinion.

2. Sustained as to Exhibits C, D & E to Lonberg's declaration. Plaintiff has not set forth sufficient facts supporting consideration of his measurements of the slopes of the various curb cuts located in the City of Riverside under Rule 702 of the Federal Rules of Evidence. Overruled as to Exhibit B and paragraph 8. Plaintiff may testify that he observed 700 corners wholly lacking needed curb cuts. Defendant's argument that the ADA only applies to sidewalks constructed after 1992 is incorrect as a matter of law.

3. Overruled. The factual accessibilities and usability of a certain corner for a person in a wheelchair does not constitute a "legal conclusion."

4. Overruled.

5. Sustained.

6. Sustained.

7. Sustained.

8. Sustained.

9. Sustained—the videotape is irrelevant to the issues presented by the instant motion [3]

## III.
## UNCONTROVERTED MATERIAL FACTS

The following facts are undisputed material facts supported by admissible evidence.

Plaintiff is a resident of the City, a public entity within the meaning of the ADA, which employs more than 50 people. Plaintiff is also a paraplegic who uses a wheelchair within the City. Plaintiff is active with respect to wheelchair access issues in the City, and has long participated in a citizen's advisory committee that advises the City how to prioritize its ADA compliance programs. Plaintiff has personally observed over 700 street corners within the City which as of October 1998 did not have curb cuts providing for wheelchair access.

Defendant adopted in 1990, and then amended in 1998, a document entitled "[Amended] Transition Plan For the Americans With Disabilities Act." This document consists of 152 pages and does not mention curb cuts or the general City sidewalks.[4] Instead, it

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[3] For this reason the Court also will not consider the videotape submitted by defendant.

[4] Defendant refers in its briefing to a transition plan consisting of over "3,000 pages, contained in 3 binders," which was not submitted to the Court for its consideration respecting the motion. Defendant has not, however, objected to the document identified as the City's transition plan which was submitted by plaintiff in support of his motion. The Court assumes that the

[Footnote continued on next page]

catalogues specific City facilities, such as recreational fields and parks, city buildings, and airports, and lists specific improvements which must be made in order to bring these particular facilities into compliance with the ADA.

In February 1998, City Public Works Director Rick McGrath distributed a memorandum describing the City's "ADA Wheelchair Ramp and Sidewalk Improvement Program." ("McGrath memorandum") This document outlines the City's plan to phase in curb cuts on major arteries and "high use streets where significant commercial businesses, schools, libraries and other public facilities are located" between 1998 and 2008. After 2008, the curb cut program will be implemented in residential areas. In addition to this program schedule, the City plans to construct individual curb cuts at specific locations requested by disabled citizens or advocacy organizations within one month of such a request (unless right of way must be acquired), even if the requested location was not yet scheduled to be brought into compliance with the ADA under the general priority schedule discussed above.

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[Footnote continued from previous page]
referenced document does indeed constitute the City's transition plan.

# IV.
# ANALYSIS

## A. Standard for Summary Judgment Motion

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Supreme Court and Ninth Circuit precedent establish the following standards for consideration of such motions: "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, *'specific facts* showing that there is a genuine issue for trial." ' *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (quoting Fed.R.Civ.P. 56(e)) (emphasis added in court opinion) (citations omitted). With respect to these specific facts offered by the non-moving party, the court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *See id.* at 630-31.

Rule 56(c) nevertheless requires this Court to enter summary judgment "after adequate time for

discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position [is] insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). In order to defeat a motion for summary judgment, the plaintiff must present "significant probative evidence tending to support the complaint." *T.W. Elec. Serv.*, 809 F.2d at 630. This court thus applies to either party's motion for summary judgment the same standard as for a motion for directed verdict: "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-52, 106 S.Ct. at 2512.

Plaintiff moves for partial summary judgment on the ground that as a matter of law City has failed to prepare or implement a transition plan report which plaintiff alleges is required by Department of Justice regulations implementing the ADA (ADA regulations). This failure, plaintiff contends, violates both the ADA regulations and also the Unruh Act, which contains a provision stating that "[a] violation of the right of an individual under the [ADA] also

constitutes a violation of [section 54 of the Unruh Act]." Cal. Civil Code § 54(c).[5] Defendant argues (1) that plaintiff may not sue under Title II of the ADA because he consulted with and assisted City in its planning to meet the requirements of the ADA and related regulations, and (2) there exists a genuine issue of material fact as to whether its transition plan complies with the ADA regulations.[6]

B. Conflict of Interest

Defendant argues that Lonberg may not sue the City to enforce its compliance with the ADA because he consulted with the City as to the development and

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[5] The parties have neither briefed nor argued any issues pertaining to the scope of the Unruh Act in general, or this provision in particular. Most importantly, neither party addresses whether section 54(c) of the Unruh Act incorporates ADA implementing regulations such as the ADA regulations at issue here, or whether a defendant who violates Title II of the ADA regulations without discriminatory intent or, perhaps, deliberate indifference, and thus is subject to injunctive but not damages relief under the ADA, *see Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir 1998), can nonetheless be held liable for damages under section 54(c) of the Unruh Act. The Court expresses no opinion on these issues here. Because neither party directs any of its briefing at the Unruh Act issues arguably presented by the motion, the Court in this Order will determine whether the City's transition plan complied with the ADA and related federal regulations.

[6] Defendant further argues that its sidewalks, viewed in their entirety, comply with Title II of the ADA, and that its self evaluation activities complied with the ADA regulations. These issues are not before the Court with respect to the instant motion

implementation of its ADA programs and because he participated in advising the City how best to prioritize the spending of its available ADA compliance funds. Defendant relies on the "common law conflict of interest doctrine," citing a 1955 opinion of the California Attorney General for the proposition that "under the common law doctrine of conflict of interest an official cannot advance his or her private interest through official action."

Whatever the scope of this common law conflict of interest doctrine, it is not applicable here. Lonberg is not acting in an "official" capacity in prosecuting this lawsuit; he is acting as a private citizen who feels his federally (and state law) protected right to travel the City streets in the same manner as any other private citizen has been and is being infringed by the City. Regardless of his political stake in this matter, he is a disabled person within the meaning of the relevant statutes and he may sue in this Court to enforce the rights he believes those statutes grant him. Defendant's conflict of interest argument is specious, and the motion will not be denied on this basis.

C. ADA Regulations

The ADA itself does not require a public entity such as City to prepare or implement a transition plan. This requirement is found in the ADA regulations, promulgated by the Department of Justice, pursuant to a Congressional grant of regulatory authority contained in 42 U.S.C. § 12134(a). *See* 28 C.F.R. § 35.150(d) (requiring, in certain situations, public

entities to prepare transition plans).[7] Neither plaintiff nor defendant briefs the issue whether this regulation is enforceable by a private citizen by means of a federal lawsuit. Several district courts have held that such a private right of action exists, at least where the plaintiff seeks only injunctive relief, and the Court, in the absence of argument to the contrary, agrees. *See, e.g. Matthews v. Jefferson,* 29 F.Supp.2d 525, 539 (W.D.Ark.1998); *Schonfeld v. City of Carlsbad,* 978 F.Supp. 1329 (S.D.Cal.1997); *McCready v. Michigan State Bar,* 881 F.Supp. 300 (W.D.Mich.1995) (private action to enforce self evaluation regulation).

The applicable regulations are relatively straightforward. Subsection (a) of 28 C.F.R. § 35.150 (section 35.150) provides that "A public entity shall operate each service, program or activity so that the service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities...." This regulation applies to facilities of a public entity which existed on January 26, 1992, and should be distinguished from 28 C.F.R. § 35.151, which applies to new

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[7] Neither party changes the validity of any ADA regulation under consideration here, and accordingly the Court need not consider whether, under the analysis required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), these regulations are substantively valid. *See Zimmerman v. Oregon Dept. of Justice,* 170 F.3d 1169 (9th Cir.1998) (holding that 28 C.F.R. § 35.140(a), prohibiting employment discrimination in public employment under Title II (as opposed to Title I) of the ADA, is invalid)

construction and alterations of facilities performed after that date.

The regulation applies to city sidewalks, *see Schonfeld v. City of Carlsbad,* 978 F.Supp. 1329, 1336 (S.D.Cal.1997) ("Streets are considered existing facilities under the regulations and, as such, curb ramps at existing sidewalks are subject to the general requirements for program accessibility."), and thus requires that defendant's streets "when viewed in their entirety," be readily accessible to and usable by individuals such as plaintiff who require wheelchairs for mobility.

The regulation does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." Section 35.150(a)(1). Rather, "A public entity may comply with the requirements of [the ADA regulations] through [a great many means, and a] public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with [the regulations]." Section 35.150(b)(1).

However, where structural changes in existing facilities are or will be undertaken to comply with the ADA regulations, "such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible." Thus, structural changes intended to bring a municipality into compliance with section 35.150(a) were to have been completed by January 26, 1995.

In addition, "[i]n the event that structural changes in

facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes." Section 35.150(d)(1). Thus, if and only if defendant will make structural changes in existing facilities in order to comply with the substantive anti-discrimination provisions of Title II of the ADA and the ADA regulations, defendant must prepare a satisfactory transition plan. If defendant plans to comply with the applicable disability access rules in some other way, it need not prepare such a plan.

Here, it is uncontroverted that defendant plans to make structural changes to its streets and sidewalks in order to comply with Title II of the ADA and the ADA regulations. Indeed, the McGrath memorandum outlining the "City's Wheelchair Ramp and Sidewalk Improvement Program," submitted by defendant, outlines a plan to engage in extensive structural renovation of existing streets and sidewalks in order to comply with these provisions of law. Thus, the Court concludes as a matter of law based on the uncontroverted facts that defendant is required to comply with the transition plan requirements of section 35.150(d).

That regulation imposes two basic requirements on defendant's mandatory transition plan. First, section 35.150(d)(2) requires the plan to contain a schedule for providing curb cuts where pedestrian walks cross curbs:

> If a public entity has responsibility or authority

> over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local places of public accommodation, and employers, followed by walkways serving other areas.

Second, section 35.150(d)(3) requires the plan to identify uncut curbs, and describe in detail how and when the curbs will be cut:

> The plan shall at a minimum-
>
> (i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
>
> (ii) Describe in detail the methods that will be used to make the facilities accessible;
>
> (iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and
>
> (iv) Indicate the official responsible for implementation of the plan.

City contends that an entity need not specifically include all these details in a document entitled

"transition plan" in order to satisfy the regulations. The Court agrees. As in *Schonfeld,* where a public entity has a sufficiently detailed curb cut plan in place, which plan comports with the above described requirements, the fact that the plan may not be part of the entity's formally designated ADA compliance program does not preclude the Court from considering it in determining the entity's compliance with the ADA and related regulations. Similarly, the fact that an entity may not have had such a plan in place within six months from June 26, 1992, as required by the ADA regulations, does not invalidate a subsequently adopted plan. *See Schonfeld,* 978 F.Supp. at 1335-36.

On the other hand, City must fully comply with the clear and specific commands of this regulation, which require it to have (years ago) created a detailed transition plan containing an inventory of physical obstacles in its streets and a year by year schedule of improvements to achieve compliance with Section 35.15. Defendant relies on section 35.150(a)(1) in correctly pointing out that it need not necessarily "make each of its facilities accessible and usable by individuals with disabilities" and repeatedly reminds the Court that its ADA compliance must be considered by viewing the City streets "in their entirety" per section 35.150(a). Although the ADA and the ADA regulations allow municipalities considerable flexibility in determining how best to comply with the general requirement that City services, programs and activities be accessible to the disabled, municipalities, in exchange for that compliance-flexibility, are subject to fairly rigorous planning and reporting requirements, such as

section 35.150(d). Thus, while the City may comply with the substantive requirements of the ADA and its implementing regulations through various flexible means, it has relatively little discretion in how it complies with the transition plan requirement of section 35.150(d). With these principles in mind, the Court considers the admissible evidence submitted by City in opposition to plaintiff's contention that as a matter of law it has not satisfied the transition plan requirement.

The Court first notes that the City's document entitled "Amended Transition Plan for the Americans With Disabilities Act" makes no mention of the sidewalk curb cut issue with respect to the City's streets in general, but rather focuses on access issues on a site by site basis. This document does not satisfy section 35.150(d).

Next, the Court concludes that the McGrath memorandum explaining the City's "ADA Wheelchair Ramp and Sidewalk Improvement Program" also fails to satisfy the above discussed requirements.

This document contains the following curb cut policy:

> The Public Works Department will analyze the entire length of a selected roadway to identify the improvements necessary to provide reasonable wheelchair access at intersections and along adjacent pathways within the street right of way. As established by the [City's] previous policy, the first priority for construction of these improvements will be along arterial streets as the

> primary travel corridors within the City, linking numerous residential, commercial, institutional and industrial areas. The second priority[ ] will be along high use streets, where significant commercial businesses, schools libraries and other public facilities are located. *The Department goal will be to complete these two priorities by the year 2008.* The last priority for the construction of these improvements will be within residential areas.
>
> In addition to the prioritized locations, the Department will construct individual ramps at specific locations requested by a citizen or organization to provide access to disabled people who frequently use these locations for their typical travel routes. The Department policy is to have these wheelchair ramps constructed within *one month* of a request unless right of way must be acquired. (Emphasis added)

The policy statement does not satisfy the City's affirmative obligations under section 35.150(d)(3), which sets forth "minimum" requirements for a municipality's transition plan.[8] First, it fails to identify by catalogue, inventory, or list the physical obstacles in the City streets which limit the accessibility of the City's programs and activities to those persons like Lonberg who use wheelchairs for mobility. Thus, the plan fails to satisfy section

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[8] The transition plan does comply with section 35.150(d)(2), because it gives priority to walkways serving entities covered by the ADA, and to walkways serving the other areas set for priority by this regulation.

35.150(d)(3)(i)'s requirement that the City "[i]dentify physical obstacles in [its] facilities that limit the accessibility of its programs or activities to individuals with disabilities."

Further, given that "the time period of the transition plan is longer than one year" the plan must (but does not) "identify steps that will be taken during each year of the transition period." Rather, the McGrath memorandum simply states the City's intention to complete curb cuts and other wheelchair related improvements on arterial and commercial streets by the year 2008. Similarly, the Memorandum does not indicate when the City's residential streets will be made wheelchair accessible.[9] These failures cause the transition plan to be in violation of section 35.150(d)(3)(iii).

Finally, the plan fails to comply with section 35.150(d)(3)(iv) because it does not identify the individual responsible for implementing the plan. Rather, the McGrath Memorandum states that the Public Works Department will implement major aspects of the plan, and identifies a particular Public Works Department senior engineer as the individual to whom individual requests for curb cut installation should be directed. The plan does not indicate

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[9] The Court does not determine here that the City's residential or other-streets are not wheelchair accessible at present. Rather, the Court simply concludes that defendant has adopted a curb cut transition plan that requires structural changes to street facilities but it does not comply with certain regulations governing such structurally oriented compliance plans.

whether this individual-or any other individual-has overall responsibility for ensuring that the plan is actually implemented. This is inadequate.[10]

Moreover, the fact that the transition plan provides that the City will respond on a site-by-site basis to an individual's or organization's, complaints about specific inaccessible locations used by disabled persons for their typical travel routes does not salvage the policy under section 35.150(d). A similar contention was made and rejected in *Tyler v. City of Manhattan*, 857 F.Supp. 800, 815 (D.Kan.1994) ("A public entity that simply adopts an approach of responding to individual complaints alleging violations of Title II has not gone far enough to affirmatively identify access problems with its services, policies, and practices ....") (holding invalid, under section 35.150(d), a public entity's transition plan for failing to (1) provide a schedule for constructing curb cuts, (2) describe in detail the methods to be employed in bringing city facilities into compliance, (3) identify the steps to be taken each year towards the goal of ADA compliance or (4) designate the public official, "whether by name or title" responsible for plan implementation).

The Court concludes as a matter of law based on the undisputed material facts that defendant has no

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[10] The transition plan does comply with section 35.150(d)(3)(i), which requires the plan to describe "in detail the methods that will be used to make the facilities accessible ...." The McGrath memorandum makes clear that curb cut style wheelchair ramps will be installed at City intersections.

adequate transition plan within the meaning of section 35.150(d) regarding structural alteration of its street facilities to achieve program accessibility by disabled persons. The evidence offered by defendant in opposition to plaintiff's motion is insufficiently probative to create a genuine issue of material fact for trial on this narrow point, and partial summary judgment will be entered in plaintiff's favor.

The bulk of defendant's evidence and legal argument in opposition to plaintiff's motion is directed at establishing a genuine issue of fact whether defendant in fact complies with the substantive anti-discrimination provisions of Title II of the ADA and the implementing regulations. This type compliance is irrelevant to the issue of defendant's compliance with the transition plan requirement of the ADA regulations. Thus, for example, the fact that Lonberg does not identify which of the 700 intersections observed by him to lack curb cuts are owned or controlled by the City does not defeat, or even affect, plaintiff's motion as limited to the transition plan compliance issue.[11] Similarly, the lengthy dispute in

[11] The Court observes that had City timely complied with the transition plan regulations contained in section 35.150(d), Lonberg, City, and all City residents would have easy access to exactly this information which defendant chides plaintiff for failing to provide. The Court further observes that defendant's contention that "it is clear that the requirements of the ADA apply only if the facilities at issue were either constructed or altered *after* January 26, 1992" is incorrect as a matter of law. Defendant supports this assertion with a citation to section 35.151, the ADA regulation governing new construction. It is the preceding regulation, section 35.150, which governs pre-

[Footnote continued on next page]

the moving, opposing and reply papers concerning curb cut slopes and ducting regulatory schemes is also irrelevant to the issue presented for decision here.

As to this transition plan issue, defendant offers essentially three items of evidence.[12] First, City offers the McGrath Memorandum, which has been analyzed above and fails completely to meet the requirements of section 35.150(d). Second, the City offers certain minutes and other records from meetings of the City's Advisory Committee on Disability Issues (the Committee), on which committee plaintiff Lonberg has served. Defendant seems to argue that these minutes, and the Committee activities documented therein, constitute a valid supplement to its transition plan. Even if the Court considers these minutes and the Committee's activities reflected therein as part of the City transition plan, there is no genuine issue of material fact as to the adequacy of the plan as so supplemented. The Committee's evaluations of the City's facilities, as presented in these documents, do not substitute for the detailed identity obligation and renovation schedule required by section 35.150(d)(3).

Third, the City points to the conclusion reached by

[Footnote continued from previous page]
1992 facilities and governs the transition plan issue presented by the instant motion.

[12] As previously noted, defendant also refers to its "several thousand" page transition plan, which is not provided to the Court, either in actual or summary form. *See* Fed R Evid. 1006.

federal Department of Transportation investigators (the agency), who, in response to complaints made to that agency by Lonberg, evaluated the City's compliance with section 35.150(d) and concluded that City was in compliance with the regulation.

This evidence is insufficient to create a genuine issue of material fact for trial as to the adequacy of defendant's transition plan under section 35.150(d). Although the factual findings contained in this report are admissible under Rule 803(8) of the Federal Rules of Evidence, the legal conclusions contained in the report, including the conclusion that defendant has complied with section 35.150(d), are not admissible. *See Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 303 (11th Cir.1989) ("Legal conclusions are inadmissible [under Rule 803(8) ] because the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires."); *Zenith Radio Corp. v. Matsushita,* 505 F.Supp. 1125, 1144 (E.D.Pa.1980) ("a finding [under Rule 803(8) ] does not include legal conclusions that may have been reached by an investigator"), rev'd in part on other grounds, 723 F.2d 238 (3d Cir.1983), rev'd in part on other grounds, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Thus, the agency's factual finding that "[b]ecause there are thousands of ramp locations throughout the City proper and residential areas, the City has targeted areas of the City rather than individual intersections" is admissible to prove the strategy

employed by the City. There are, however, no material factual disputes concerning the contents of defendant's transition plan or its strategy chosen for ADA compliance. Rather, the issue for decision is a legal issue-does the City's transition plan comply with the relevant ADA regulations. The Court concludes as a matter of law based on the uncontroverted facts that the plan does not comply, and nothing in the agency's report alters this conclusion.

Furthermore, this case is nothing like *Schonfeld v. City of Carlsbad,* 978 F.Supp. 1329 (S.D.Cal.1997), heavily relied upon by defendant. In *Schonfeld,* the defendant City had prepared a "Sidewalk Inventory Report" and "an index listing every public street in the City and a comprehensive inventory of all existing and missing ramps located within the public right-of-way." *Id.* at 1336. In addition, the defendant City had published a Pedestrian Ramp Inventory, listing 900 locations chosen for curb cut installation or renovation, and had submitted to the Court a four year plan for repairing and installing necessary curb cuts, which included budgetary set asides to fund the planned repairs. *Id.* at 1337. Defendant has submitted no evidence of this sort.

Finally, the Court rejects defendant's contention that "there is at a minimum a genuine issue of material fact as to whether the alterations demanded by plaintiff would impose an undue financial and administrative burden on the City." This contention lacks merit for several reasons. First, defendant fails to address how complying with the *transition plan* regulation at issue in this case would constitute an

undue financial or administrative burden. Defendant instead directs its argument at the burden posed by complying with the ADA's substantive anti-discrimination provisions. Thus, defendant's evidence fails to create a genuine issue of material fact as to the burden compliance with section 35.150(d) would impose on it.[13]

Second, the undue burden regulation, section 35.150(a)(3), states that a public entity may prove that compliance with *section 35.150(a)* is unduly burdensome. The regulation does not suggest that such a defense even applies to the transition plan requirement, which is contained in section 35.150(d), not section 35.150(a). The Court concludes that it does not.

Third, even if section 35.150(a)(3) did apply to the transition plan requirement, the regulation requires that the public entity "take any other action that would not result in such ... burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity." If a complete inventory of the City's intersections and curb cuts were somehow unduly burdensome-a proposition for which there is no evidence before the Court-the City was obligated to take whatever action it could to achieve the goals of the transition plan requirement. There is no genuine issue of material fact as to the City's failure to do so.

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[13] Under section 35.150(a)(3), the public entity claiming that compliance would be unduly burdensome bears the burden of proof on this issue.

The Court does not conclude that precise, technical compliance with section 35.150(d) is required for a municipality to avoid being found in violation of the ADA. Indeed, other Courts have expressly held that "substantial compliance" with the ADA regulations is good enough. *See Paralyzed Veterans of America v. Ellerbe Becket Architects and Engineers, P.C.*, 950 F.Supp. 393, 399 (D.D.C.1996) ("In practice, the Justice Department has never required more than substantial compliance."); *Tyler,* 857 F.Supp. at 821. Nonetheless, whatever the required degree of compliance with the transition plan regulation, defendant has not achieved it. Thus, the Court concludes as a matter of law based on the uncontroverted facts that defendant is currently in violation of 28 C.F.R. § 35.150(d). Plaintiff's motion for partial summary judgment will be granted.[14]

[V.]
DISPOSITION

IT IS ORDERED THAT:

Plaintiffs John Lonberg's Motion for Partial Summary Judgment is Granted.

[Available at *Lonberg v. City of Riverside*, 2000 WL 34602547 (C.D. Cal. June 12, 2000).]

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[14] Plaintiff has not requested any specific remedy in connection with the instant motion for partial summary judgment, and in particular has not requested injunctive relief be awarded at this time. Accordingly, the Court will order no remedy, other than declaratory relief.

## APPENDIX E

### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| JOHN LONBERG, an individual,<br>*Plaintiff-Appellee*,<br>v.<br>CITY OF RIVERSIDE, a municipal corporation,<br>*Defendant-Appellant*. | No. 06-55781<br>D.C. No. CV-97-00237-SGL<br>Central District of California, Riverside<br>ORDER |

Before: HALL, SILVERMAN and CALLAHAN, Circuit Judges.

Within 14 days, defendant-appellant the City of Riverside, shall file a response to the petition for rehearing en banc. Plaintiff-appellee may reply within 14 days of the response; the reply shall not exceed the length permitted for the response. *See* 9th Cir. R. 40-1.

SO ORDERED.

[Filed July 17, 2009]

## APPENDIX F

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| JOHN LONBERG, an individual,<br>*Plaintiff-Appellee,*<br>v.<br>CITY OF RIVERSIDE, a municipal corporation,<br>*Defendant-Appellant.* | No. 06-55781<br>D.C. No. CV-97-00237-SGL<br>Central District of California<br>ORDER |

Before: HALL, SILVERMAN and CALLAHAN, Circuit Judges.

Judges Silverman and Callahan vote to deny the petition for rehearing en banc and Judge Hall so recommends.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc, filed July 10, 2009 is DENIED.

[Filed January 15, 2010]